are trustees for A, B, and C, A can sue a subpoena against B and C, and he may, according to a well established practice, join himself formally as co-defendant. And it is a remedy against B and C which his substantive rights require. Observe that we do not reach the question of merger until we have determined what A's equitable right is, to what it extends, and against whom it may be enforced, assuming that it may have a separate existence. This interest is not a beneficial interest merely in his own undivided share of the legal estate. It entitles him to a participation in the benefits of the joint management of the entire property, irrespective of any division into legal moieties. If he sought and were permitted to terminate the trust, something more than his own separate act would be required. He could not single out his own legal moiety, but must obtain a release from the others or a conveyance from all three.[29] Thus there is no *pro rata* apportionment, moiety by moiety, of legal to equitable interest. Every share carries with it an equitable right to a portion of the rents and profits of the legal estate in its entirety. The trustees are liable, irrespective of the relative size of their legal moieties, for the losses resulting from their dereliction.[30] It is therefore quite immaterial that all the trustees are beneficiaries and all the beneficiaries are trustees. All are trustees, not for themselves only, but also for each other, with respect to the management and enjoyment, the enforcement, and the termination of the trust.[31]

It is clear, therefore, that if the doctrine of merger may properly be applied to commercial trusts, the provision of more than one trustee should protect against the destructive consequences of a merger.[32]

TRANSFER *v.* ENDORSEMENT

Of course an endorser without recourse does not escape all duties to his endorsee, as is illustrated by the decision in *Miller v. Stewart* (1919, Tex. Civ. App.) 214 S. W. 565. He is still liable to his transferee if the "maker's" signature proves, later, to be forged. But one may be excused for needing a reminder of the fact. The concept of *transfer*[1] of a negotiable instrument has in common thought become so

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[29] *Chapin v. First Universalist Society* (1857, Mass.) 8 Gray, 580.

[30] *Hayes v. Hall* (1905) 188 Mass. 510, 74 N. E. 935.

[31] A devise was made to four children in trust to hold and divide the rents and profits among them, with a division of the principal at such time as all should agree upon a sale. This was held to constitute an active trust such as to prevent a partition without the consent of all. All four children were collectively obligated to carry on the active management for the benefit of each. *Harris v. Harris* (1903) 205 Pa. St. 460, 55 Atl. 30.

[32] Accord in opinion, although other beneficiaries existed in addition to those who were also trustees. *Burbach v. Burbach* (1905) 217 Ill. 54, 75 N. E. 519.

[1] *Transfer* is used in this paper as a general term to denote the "passing of

overlaid with the idea of *endorsement* and of endorser's liability, that it is easy to forget these other, often quite distinct features of a transfer on which litigation sometimes turns. And it is singularly difficult to find in the books a discussion in which all the major aspects of transfer are brought into juxtaposition and comparison.

(1) The first and simplest thing such a transfer may do is to pass to the transferee such claims against the obligors and such title against prior owners as the transferor himself enjoyed—to operate, in other words, as the *assignment* of a chose in action. For that, neither consideration nor endorsement is necessary; neither capacity of the transferor nor legality of purpose would seem to be. Mere delivery of an unendorsed order instrument, by a minor payee, as a gift, made to bribe a public official, would suffice to put the transferee into the minor's shoes.[2] The case stands much as would the gratuitous transfer of a chattel.

(2) A new element is introduced if the note transferred is not merely given, but is *sold* for a price. A price is good consideration to support a warranty.[3] And in the absence of agreement to the contrary, the transferor by sale is held, like any vendor of a chattel, "impliedly to warrant" that the thing sold is what it purports to be:[4] a genuine note with genuine endorsements, in the terms indicated on

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title," the divesting in an old holder of his beneficial legal relations concerning an instrument, and the investing of the new holder with similar relations. *Assignment* is used to mean the transfer, substantially, of just the relations the transferor himself enjoyed. *Negotiation* is used to indicate a transfer which "cuts off equities," which creates in the taker wider and fuller powers, privileges and rights than were enjoyed by the transferor. *Sale* means transfer for a price, to which "implied warranties" will attach by operation of law. *Endorser's contract* refers to the legal duties laid on a person by virtue of his endorsement of a note or bill, as distinguished from those incurred by a sale of the instrument.

[2] That is, substantially. But the infant would still have power to revoke the gift. The donee would lack the power which his donor (as long as he possessed the instrument) had, to create a holder in due course. And the donee would by the better rule, in a suit against the maker, lack the presumption of ownership which the payee would enjoy. *Swanby v. Northern State Bank* (1912) 150 Wis. 572, 137 N. W. 763; *Wade v. Boone* (1914) 184 Mo. App. 88, 168 S. W. 360; *Sloan v. Gilmore* (1914, Tex. Civ. App.) 167 S. W. 1089. The recent cases *contra, Callahan v. Louisville Dry Goods Co.* (1910) 140 Ky. 712, 131 S. W. 995, and *Woodward v. Donavan* (1912) 167 Ill. App. 503, are reasoned either poorly or not at all, save for *Roy v. Duff* (1915) 170 Iowa, 319, 152 N. W. 606, which in a *dictum* admits a presumption that the possessor is empowered and privileged to sue *for the orderee.*

[3] Even if N. I. L. secs. 28 and 52 do not limit secs. 65 and 30 so as to let in the question of consideration in suits on warranties, it is believed clear that that question should be open under sec. 196.

[4] These "implied warranties" are sets of legal relations (power to rescind, right to damages, etc.) attached by the law to the transaction of sale. Nevertheless, it is believed that they fall sufficiently under principles of contract to make applicable the contract rules on illegality, capacity and consideration. Only the last is discussed in the text.

its face;[5] free from defences for want of capacity;[6] and that the transferor has, and has by the sale exercised power to pass good title to it;[7] and that he knows of no illegality or insolvency which would render valueless any obligation on the instrument.[8] In case of forgery, in the signature of any "obligor" or in the chain of title; in case of alteration, or incapacity[9]—the law of sales applies. So in the principal case. And that law applies irrespective of endorsement;[10] what matters to a sale the form of the transfer? The question is: is the "thing sold," are the legal relations vested by the sale in the vendee, what they reasonably appeared to be, or are they not? And as in the case of chattel-sale, it is believed that the vendee's knowledge of the facts should bar recovery on "implied warranty."[11]

(3) But the transfer of negotiable paper may have that other consequence which has given the paper its name: the rendering of the taker a holder in due course: if, before an instrument fair on its face was overdue, he has taken it for value, in good faith, and without notice.[12] To produce this result the transferor may have to sign his name. But that in no way means that he must assume the *contracts* of an *endorser;* even if the instrument reads to *his* order, his endorsement "without recourse" will be as effective as a general endorsement,

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[5] N. I. L. sec. 65 (1). It purports to carry rights against endorsers as well as against the primary obligor.

[6] *Ibid.* (3).

[7] *Ibid.* (2): "that he has good title to it." If this does not mean "power to give good title" it is difficult to find reason for the provision. For if the taker takes *bona fide,* he becomes a holder in due course, sustaining no damage and needing no warranty; if he knows of a defect in title, there is no room for implied warranty. And although the vendor's "having" good title may become operative in the case suggested in sec. 49: if value is given before notice, but endorsement not obtained till after—yet the vital thing is believed still to be: whether good title has *passed. Cf.* the language of the Uniform Bills of Lading Act, sec. 35 (b), (d).

[8] *Ibid.* (4) While this section seems to be directed to the primary obligation, it is believed to apply, like (1), to the endorsers' duties as well. Nor is it believed that the instrument need be wholly valueless, to enable suit to be maintained.

[9] Would actual disaffirmance be a condition precedent to suit on the warranty?

[10] While an order instrument sold and delivered without endorsement is not *negotiated* within the language of sec. 30, and would thus seem excluded from the warranties provided in sec. 65, it is believed that the warranties should and would attach, and that resort to sec. 49 should be unnecessary. The right to have the endorsement should give as full rights *against the vendor* as the endorsement itself.

[11] *Cf.* the law on inspection by the buyer of a chattel as to warranty of patent defects. Williston, *Sales* (1909) sec. 234. This result must follow, if the law attaches implied warranties because of justifiable reliance by the buyer on the seller.

[12] N. I. L. sec. 52.

to create a *bona fide* holder;[13] and the words "without recourse" expressly negative all *endorser's* duties.[14]

(4) The endorser's *contract,* then, although it runs so commonly in men's minds in connection with the transfer of negotiable paper, is a wholly severable thing. It may, or it may not, be added to a transfer. A different, unusual contract, like that of guaranty, may be added in its place.[15] And, for the endorser to come under a duty to his immediate endorsee, all the elements of any contract must be present: capacity, consideration, legality, form.[16] Any or all of these may be absent, and yet an assignment be operative; any or all but consideration—value—may be absent from a valid negotiation. This severability, this apartness of the endorser's contract, is emphasized by comparison of notes and bills with other negotiable paper: bills of lading under the Uniform Act. Such instruments know no contract of endorsement; yet the vital features of negotiability they possess: transfer to a holder in due course wipes out defences of the contract-obligor, wipes out as well the title-claims of prior owners of the paper, both to the contract and to the property it represents.

If the above analysis is sound, it should indicate something of the nature of the transfer of bills and notes: exactly wherein such transfer is not peculiar to itself, and exactly wherein it is; what the elements are of its peculiarity; and what the facts are which operate to cause these peculiar results. In regard to (1) mere assignment and (2) mere sale, it is believed that useful, if not controlling, analogies are to be drawn from the field of choses in action generally. In regard to (3) the

[13] *Ibid.,* sec. 38. But, as Ames pointed out, under sec. 65 an endorser without recourse (as opposed to a transferor by mere delivery) would seem to be liable on his warranties to subsequent holders of the instrument.

[14] But to negative any duty which is ordinarily assumed by signature on the back of a note or bill, the words to be added will do well to be exceedingly explicit. "I assign my right, title and interest in the within note" is not usually held to exclude the assumption of an endorser's duties. This view has been criticized. (1916) 15 MICH. L. REV. 71; (1916) 83 CENT. L. J. 190. It may be questioned whether the criticism does not allow technicality to outweigh sound sense; in any case, it is out of harmony with the decided tendency of the courts to find some sort of liability, if a man's name is on the instrument. So in the instant case "without recourse on me *in any way*" did not exclude the "warranty of genuineness."

[15] Indeed the only way of restricting the rights and powers of a transferee, negativing even warranty or gift, is by writing on the back of the instrument the requisite words of "endorsement"—"for collection" or whatnot.

[16] Here should be noted that other peculiar feature of endorsement: that it puts the endorser under warrantor's and endorser's duties to *all subsequent holders* in due course. N. I. L. sec. 66. This warranty to sub-vendees, by reason of endorsement, of course goes beyond the law of sales. Williston, *op. cit.,* sec. 244. It is the one element which endorsement without recourse seems to have in common with unqualified endorsement. See note 13. As to the sub-vendee, too, the matters of consideration and, in the ordinary case, of legality, would be immaterial in this particular.

creation of a holder in due course, the analogies to bills of lading under the Act is striking and instructive, and those to warehouse receipts and again, to stock certificates, only slightly less so. Only in regard to (4) the contracts entered into purely and solely by endorsement, does the law of transfer of bills and notes become a complex of rules wholly unto itself.

K. N. L.

EARMARKS OF THE TIMES

Law changes, adjusting to the times. It changes in the courts.[1] This is not pleasant for the litigant whose foothold the adjustment sweeps from under him. Nor is it pleasant for his counsel who sees new law made overnight. But it is the fact; it helps little to deny it; it is poor work building on "the first principle that nothing is true which is disagreeable, and that we must not believe anything that is 'shocking,' no matter what the evidence may be." When the evidence is given by the court itself, it should be the more convincing.[2] In *Kintz v. Harriger* (1919, Ohio) 124 N. E. 168, the court was asked to allow an action for malicious prosecution against one who, perjuring himself, had wilfully and maliciously given false testimony before the grand jury, which evidence led to the indictment and trial of the plaintiff. The court conceded that "the weight of precedent for a century and more" was to the effect of absolute privilege in the defendant.[3] But it was held unanimously that the action lay.

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[1] Professor A. L. Corbin, *The Law and the Judges* (1914) 3 YALE REVIEW (N. S.) 234; Judge Francis J. Swayze, *The Growing Law* (1915) 25 YALE LAW JOURNAL, 1; Judge John E. Young, *The Law as an Expression of Community Ideals* (1917) 27 *ibid.*, 1; see also (1918) *ibid.*, 668.

[2] Another recent instance was the decision in *Jones v. Hawkeye Coml. Men's Assn.* (1918, Iowa) 168 N. W. 305, over the able dissent of Weaver, J. "On the whole," says the court of the line of the precedents, "they fairly sustain the appellant's argument, and *we face the responsibility of agreeing or disagreeing with them.*" (Italics the editor's.) The court proceeded to take the responsibility of disagreeing. See (1918) 28 YALE LAW JOURNAL, 193. Numerous cases may be found where like-minded judges have, from the bench, given express recognition of their own law-making function and of the reason of its exercise. *"Quicquid agant homines,"* said Lord Mansfield, "is the business of Courts, and as the usages of society alter, the law must adapt itself to the various situations of mankind." *Barwell v. Brooks* (1784, K. B.) 3 Doug. 371, 373. See also Willes, C. J., in *Davies v. Powell* (1738, C. P.) Willes, 46, 51; Lord Cottenham in *Walworth v. Holt* (1841, Eng. Ch.) 4 My. & C. 619, 635; Gibson, C. J., in *Lyle v. Richards* (1823, Pa.) 9 S. & R. 322, 351. Other judges view their business differently. "It is my wish and my comfort," said Lord Kenyon, "to stand *super antiquas vias.* I cannot legislate; but by my industry I can discover what our predecessors have done, and I will servilely tread in their steps." *Bauerman v. Radenius* (1798, K. B.) 7 T. R. 663, 668. Yet even Lord Kenyon found himself legislating. *Goodisson v. Nunn* (1792, K. B.) 4 T. R. 761.

[3] See *Keeley v. Great N. Ry.* (1914) 156 Wis. 181, 145 N. W. 664; 4 B. R. C. 959.